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Court of Appeals  
Division II  
State of Washington  
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No. 53668-4-II

COURT OF APPEALS  
DIVISION II  
OF THE STATE OF WASHINGTON

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KITSAP COUNTY, a political subdivision of the State of Washington,  
Respondent,

v.

KITSAP RIFLE AND REVOLVER CLUB, a not-for-profit corporation  
registered in the State of Washington, and JOHN DOES and  
JANE DOES I-XX, inclusive, Appellants,

and

IN THE MATTER OF NUSAINCE AND UNPERMITTED  
CONDITIONS LOCATED AT  
One 72-acre parcel identified by Kitsap County Tax Parcel ID No. 362501-  
4-002-1006 with street address 4900 Seabeck Highway NW,  
Bremerton Washington, Defendant.

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REPLY OF APPELLANT

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## I. INTRODUCTION

Appellant Kitsap Rifle and Revolver Club (the “Club” or “KRRC”) presents the following reply in support of its *Brief of Appellant* (“Opening Brief”) filed on November 27, 2019. The Opening Brief showed that the trial court erred when it failed to properly follow the instructions in this Court’s Unpublished Opinion and applicable laws by entering the *Order Amending December 2, 2016 Contempt Order* dated June 7, 2019 (“Amended Contempt Order”) because it contains a purge condition that the Club cannot immediately perform without relying on the County’s actions and discretion and because the purge condition is not reasonably related to the nature or cause of the contempt. The trial court’s errors resulted in a purge condition that is impermissibly punitive and contrary to law. The County’s response arguments, discussed in greater detail below, are unavailing. The Amended Contempt Order, or at least the portion of it that states the purge condition, should be reversed or vacated and remanded for entry of a purge condition that identifies the specific type of SDAP application needed to cure the violations of KCC Titles 12 and 19 found in the original Judgment. The Court should also instruct the trial court to refashion the purge condition so that it requires the Club to submit no more than a complete SDAP-Grading 2 application.

Washington law requires a remedial purge condition to be one that the contemnor can immediately perform without depending on the discretion actions of third parties. *In re Silva*, 166 Wash. 2d 133, 142 n.5, 206 P.3d 1240 (2009). The purge condition requires the Club to submit a “complete” SDAP application “to cure violations of KCC Titles 12 and 19 found to exist on the [Club’s] Property in the original Judgment[.]”<sup>1</sup> The purge condition does not say what type of SDAP application the Club must submit to cure the violations found in the original Judgment, even though the County distinguishes between at least 11 different types of SDAP applications and the facts of this case show it exercises its discretion to cancel an application without determining whether it is complete if it believes the application is not the “correct permit type.” Because of this, the Club does not have the power to immediately perform the purge condition without the County’s discretionary approval that it is the “correct permit type” to cure the violations.

The purge condition should also be reversed because it is not reasonably related to the cause or nature of the contempt. The County’s permitting literature shows an SDAP-Grading 2 is the appropriate permit for projects involving movement of between 500 and 5,000 cubic yards of

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<sup>1</sup> The “original Judgment” refers to the trial court’s *Findings of Fact, Conclusions of Law and Orders* dated February 9, 2012. CP at 1–45.

earth. CP at 408. The original Judgment found a number of specific violations of Titles 12 and 19 of the Kitsap County Code, and it found these violations involved more than 600 cubic yards of earth movement. CP at 10–12 (FOF 34–35, 41) 15 (FOF 54–55), 18 (FOF 62, 64). There are no findings that the violations involved more than 5,000 cubic yards of earth movement. Because the non-specific purge condition allowed the County to require more than an SDAP-Grading 2 application to cure the violations found in the original Judgment, it was not reasonably related to the cause or nature of the contempt. This is another reason the purge condition in the Amended Contempt Order should be reversed.

## II. ARGUMENT

### A. **The Purge Condition Is Not Within the Club’s Immediate Power to Perform Because It Depends on the County’s Discretionary Determinations as to Whether the Club Applied for the “Correct Permit Type” and Whether to Cancel Its Application.**

The Club’s Opening Brief showed that a purge condition in a contempt order must identify an “affirmative act” that a party has the “capacity to immediately” perform and “complete” without having to rely on a third party’s actions, such that the “contemnor carries the keys of his prison in his own pocket.” Opening Br. at 17 (citing *In re M.B.*, 101 Wash. App. 425, 439, 3 P.3d 780 (2000); *Silva*, 166 Wash. 2d at 142 n.5; *In re J.L.*, 140 Wash. App. 438, 447, 166 P.3d 776 (2007); *Kitsap County*

v. *KRRC* (“Unpublished Opinion”), No. 50011-6-II at 21 (Jan. 30, 2018) (unpublished opinion)). The *Response Brief of Appellee/Respondent Kitsap County* (“Response”) does not dispute this statement of law, which it paraphrases to mean “the Club must have the ability to satisfy the purge condition.” Resp. at 14–15. To be clear, this appeal of the purge condition is not about whether the Club has the resources to perform the purge condition, which is the subject of the Club’s appeal in case number 53878-4-II. This appeal is about whether the *purge condition* requires an act that can be immediately performed without relying on the County’s discretion. Because the purge condition fails that standard, it must be reversed or vacated.

The Club’s Opening Brief showed the non-specific purge condition was not within the Club’s immediate power to perform because it depended on the County’s discretionary determination as to whether the Club had applied for the correct type of SDAP. Opening Br. at 19–2. The County’s Response admits the purge condition allows it to respond “in multiple ways” if it “disagrees that the Club’s application is the correct type of SDAP to address the violations.” Resp. at 16. This admission describes two discretionary determinations by the County: (1) whether to disagree with the Club’s choice of application type; and (2) how to respond if such a disagreement exists.

The discretionary nature of the County's determinations are evident in the record. According to the County, "[i]t was agreed between the Club's consultant and DCD" prior to submission of the Club's SDAP-Grading 2 application "that an SDAP commercial was appropriate." Resp. at 25 (citing CP at 441 ¶ 5 (Declaration of Jeff Rimack)). Mr. Rimack's testimony, however, contains no evidence of any agreement by the Club's consultant, Soundview Consultants. CP at 441. The Club did not agree with the County's determination that an SDAP-Commercial application was required, as evidenced by the Club's submission of an SDAP-Grading 2 application and its email to the County on June 4, 2019, confirming the parties' respective positions. CP at 400.

Mr. Rimack's declaration clearly shows it was the County's decision to require an SDAP-Commercial application. The declaration describes a July 11, 2018 "staff consultation meeting" with Soundview that occurred prior to the Club's submission of an SDAP-Grading 2 application. CP at 441 ¶ 3. Mr. Rimack testified

"At the meeting, Soundview presented to staff what work had been done at the property that needed to be permitted. . . . After Soundview explained to staff the work done and its purpose, staff responded that we believe that an SDAP commercial was needed. The reason an SDAP commercial was required instead of a simple grading permit was because of the use of the property as described by Soundview. Even if the use was viewed as non-commercial, it would still require an SDAP 3 with

engineering due to the amount of earth work and the amount of cleared area.”

*Id.* ¶ 5 (underline added). This testimony shows the County determined the type of permit required to cure the violations, and it made this determination before the Club submitted its application. The County’s determination of the correct permit type was controlled by the County, not the Club.

The County argues the “Club controls [its] own scope of work for any SDAP and the County cannot speculate what the Club’s plans are prior to the actual submittal of a complete application or other information provided by the Club.” Resp. at 16–17. The County fails to appreciate that the Club has been ordered to obtain after-the-fact permitting for work already completed, not some future scope of work. That is why Mr. Rimack testified the County decided an SDAP-Commercial application was needed “[a]fter Soundview explained to staff the work done and its purpose[.]” CP at 441 ¶ 5 (underline added).

Mr. Rimack’s declaration does not allude to any additional site development work proposed by Soundview or the Club to cure the violations found in the original Judgment. Similarly, the original Judgment contains no findings that additional site development work is required to cure the violations. *See generally* CP at 8–19. After

discovery, a fourteen-day trial, numerous findings of fact, years of appeals, and at least two SDAP applications, the County's supposed ignorance about the scope of work that requires after-the-fact permitting defies credulity.

The County obtained a non-specific purge condition so that it could continue exercising its discretion adversely to the Club by deciding the type of SDAP application it had to submit. The purge condition does not require "whatever SDAP application the County requires," but that is how the County interprets it.

The County's actions also show it interprets the purge condition to give it discretion to cancel any application the Club submits simply by deeming it the incorrect type of application. This has already happened twice, first in 2016 when the County rejected the Club's SDAP-Grading 1 application and said the Club had to submit an SDAP-Grading 3 application (CP at 276–80) and again in 2019 when the County cancelled the Club's SDAP-Grading 2 application and said the Club had to submit an SDAP-Commercial application. CP at 468–69. The County has exercised its discretion adversely to the Club, and it has done so inconsistently.

In its Response, the County contends its discretionary acts "do not take away or impact the Club's ability to comply with the purge

condition—to submit a complete application for an SDAP.” Resp. at 16. Similarly, the County asserts the contempt sanction “stops with the submittal of a complete application.” *Id.* at 27. The purge condition, however, does merely require the Club to submit *any* complete SDAP application. Instead, the purge condition requires the application to be “for permitting to cure violations of KCC Titles 12 and 19 found to exist on the Property in the original Judgment[.]” CP at 454. By obtaining a purge condition that does not say what type of application is required to cure those specific violations found in the original Judgment, the County retained discretion to make that determination, which renders the purge condition impermissibly discretionary.

There do not appear to be any objective standards governing the County’s determination that an SDAP-Commercial application is required to cure the violations found in the original Judgment. The County’s Response identifies no code provision describing an SDAP-Commercial application, let alone one that can be used to determine whether such an application is required. The very concept of an SDAP-Commercial application appears to be a product of the County’s discretion.

The County has never clearly explained how it exercises its discretion to decide the type of permit application required by the purge condition. The County has never clearly explained why the Club cannot

cure the site development violations found in the original Judgment by applying for an SDAP-Grading 2. The County has never clearly explained why it previously required an SDAP-Grading 3 application but it now requires an SDAP-Commercial application.

The Club cannot perform the purge condition without relying on the County to decide first whether the Club has submitted the correct type of application and whether to cancel the Club's application, which are discretionary acts by the County. The purge condition should have stated the type of SDAP application required to cure the violations found in the original Judgment.

By exercising its discretion to cancel the Club's SDAP-Grading 2 application, the County punitively withheld from the Club a determination of whether the application was "complete," which is a requirement of both the purge condition and Kitsap County Code (KCC) § 21.04.200(A). The County's Response disputes this by arguing the Club "submitted an *incomplete* SDAP application for a Type II SDAP." Resp. at 11 (italics added). The County's email to the Club regarding the cancellation, however, shows the County's only reason for cancelling the application was that it was not for the "correct permit type." CP at 468-69. There is no evidence the County ever reviewed the SDAP-Grading 2 application for completeness or communicated the results of a completeness review to

the Club. The County exercised its discretion to cancel the Club's SDAP-Grading 2 application without ever determining whether it was complete.

By fashioning a purge condition that does not specify the type of application the Club must submit to cure the violations found in the original Judgment, the trial court made the Club's performance of the purge condition dependent on the County's discretion and left the Club without the immediate power to perform the purge condition. This was in error. The purge condition should be reversed because it effectively requires the Club to fit a key to a lock the County can change at will.

The Club's Opening Brief analogizes the County's discretionary approval of the Club's SDAP application type to the impermissibly discretionary purge condition vacated by the Court's Unpublished Opinion. Opening Br. at 21. That vacated purge condition required the Club to obtain permitting from the County, which was beyond the Club's immediate power to perform. The refashioned purge condition similarly gives the County an impermissible level of discretion to determine whether the Club has performed the purge condition.

This case is also like *In re M.B.*, where the purge condition required a juvenile to enroll and be accepted into a treatment program. 101 Wash. App. at 459. While the juvenile could attempt to enroll in the program, she could not control whether she was accepted. *Id.* at 460.

Allowing a third party to control the juvenile's performance of the purge condition "defeated" its coercive purpose and rendered the purge condition "unlawful." *Id.*

The County responds that this case is more similar to *Matter of Detention of Faga*, 8 Wash. App. 2d 896, 901–02, 437 P.3d 741 (2019). Resp. at 18–19. There, the purge condition required the appellant to sign "informed consent waivers" required by the State's experts and then "participate in evaluations" with those experts. *Id.* at 899, 902. When the appellant refused to sign the waivers, the experts refused to conduct the evaluations. *Id.* The appellant argued his ability to perform the purge condition impermissibly depended on the actions of third parties. *Id.* at 901. The Court disagreed because all the appellant had to do was "sign the required forms" for the experts to perform the evaluations. *Id.* at 902.

This case is unlike *Faga* because in *Faga* the purge condition required the appellant to sign specific waiver forms, rather than submit an unspecified type of waiver form that the state's experts had discretion to reject. *Faga* expressly distinguished *M.B.* on the grounds that in *M.B.* "the contemnor performed the task requested by the trial court and the trial court rejected the effort because it did not meet undisclosed expectations." *Id.* at 903. That describes the present case, where the Club attempted to submit the required forms but the County rejected them for being the

wrong type, even though the purge condition did not say the Club had to submit the type of forms required by the County.

To correct the erroneous purge condition so that it describes an act the Club can immediately perform without relying on the County's discretion, the Amended Contempt Order, or at least the portion of it that states the purge condition, should be reversed or vacated and remanded for entry of a purge condition that identifies the specific type of SDAP application needed to cure the violations of KCC Titles 12 and 19 found in the original Judgment.

**B. The Purge Condition Should Require No More Than an SDAP-Grading 2 Application.**

The County suggests the type of SDAP application required by the purge condition should not be determined by the findings of fact in the original Judgment. If this is true, then the purge condition should be vacated as impermissibly discretionary for the reasons discussed above. If, however, the findings of fact determine the type of SDAP application required by the purge condition, then the Court should require the purge condition to be refashioned to require no more than an SDAP-Grading 2 application.

The Club's Opening Brief argued the purge condition should require no more than an SDAP-Grading 2 application because: (1) "[t]he

County describes an SDAP-Grading 2 application as being required for projects involving earth movement between 500 and 5,000 cubic yards” and (2) “[t]he original trial judgment contains six findings that the Club moved in excess of 150 cubic yards of earth, but it does not indicate that the Club moved more than 5,000 cubic yards of earth.” Opening Br. at 25. The County’s Response does not dispute these propositions.

The County argues the “actual amount of earth moved or type of SDAP needed was never factually determined by the trial court.” Resp. at 22. If this is true, then the original Judgment did not find site development violations involving movement of more than 5,000 cubic yards of earth.

The County suggests the purge condition can require the Club to cure violations that were not found in the original Judgment because the County supposedly has evidence that they occurred. Resp. at 22–23. The County purports to have obtained this evidence “during the discovery process for the 2012 trial[.]” *Id.* The purge condition, however, requires the Club to apply for “permitting to cure violations of KCC Titles 12 and 19 *found to exist on the Property in the original Judgment[.]*” CP at 454 (italics added). The purge condition does not require the Club to cure violations that were not found in the original Judgment.

The original Judgment found violations of KCC Titles 12 and 19 involving aggregate earth movement in excess of 600 cubic yards. CP at

10–12 (FOF 34–35, 41) 15 (FOF 54–55), 18 (FOF 62, 64). It did not find that more than 5,000 cubic yards had been moved, nor did it find the 5,000-cubic-yard threshold had been exceeded or violated. *Id.* The County’s position that the Club had moved more than 5,000 cubic yards of earth was not a violation “found to exist on the Property in the original Judgment.” The County wrongly interprets the purge condition to require the Club to apply for earth movement in excess of 5,000 cubic yards.

The County argues “earth movement is not the only factor in what type of SDAP is applicable” because, under KCC § 12.16.030(3), “[l]and disturbing activity of one or more acres requires an engineered grading plan.” Resp. at 23. KCC § 12.16.030(3), however, does not state the type of SDAP application that is required for a project involving land disturbance of one or more acres. Moreover, the original Judgment found that more than an acre of land was cleared in the area of the formerly planned (but abandoned) 300-meter range project. CP at 12 (FOF 40–41). It did not find an acre or more of land disturbance within the Club’s historical eight acres, so that area does not require an engineered grading plan under KCC § 12.16.030(3). *Id.*

The County’s Response makes little effort to support or explain its position that the Purge Condition required an SDAP-Commercial application. It asserts “the change from DCD regarding a[n] SDAP 3 to an

SDAP Commercial arose from a staff consultation meeting with the Club’s consultants.” Resp. at 23 (citing CP at 441–42 ¶ 5). But the Response does not say what occurred at the meeting that caused the County to change its position.

Mr. Rimack’s declaration says: “The reason an SDAP commercial was required instead of a simple grading permit was because of the use of the property as described by Soundview.” CP at 441 ¶ 5. The declaration does not say how Soundview described the use of the property, how the County used that information to decide an SDAP-Commercial was required, or how that information differed from what the County knew in 2016 when it testified that an SDAP-Grading 3 was required. *Id.* The County’s inability to clearly explain its change in position or why it required the Club to submit an SDAP-Commercial application suggests that its decision was not just discretionary, it was arbitrary.

Most importantly, the County identifies no code provision or other legal authority that required the Club to submit an SDAP-Grading 3 or SDAP-Commercial application to cure the violations found to exist in the original Judgment. The Purge Condition can require no more than an SDAP-Grading 2 to cure those violations because that type of permit applies to the earth movement of between 500 and 5,000 cubic yards that was actually found to have occurred.

**C. The Type of Permit Application Required to Cure the Violations Found in the Original Judgment Is Highly Relevant to the Purge Condition, as Shown by the County's Own Conduct.**

The County argues the type of SDAP application required by the purge condition is “irrelevant to the purge condition because it stops with the submittal of a complete application.” Resp. at 27. The facts in the record, however, clearly show the County cancelled the Club’s SDAP-Grading 2 application because it considered it the wrong “type.” CP at 469–70. The County appears to have not even considered, let alone decided, whether it was a complete SDAP-Grading 2 application. *Id.*

The County’s words and actions show its actual position is not that the purge condition is satisfied upon submittal of a complete application; it is that the purge condition is satisfied only upon submittal of a complete application of the type the County deems to be “correct.” *Id.* The type of application required to cure the violations found in the original Judgment is highly relevant to the purge condition.

KCC § 21.04.200(A) provides that within 28 days of receiving a project permit application, the DCD shall deliver a written determination that the application is complete or a statement regarding “what is necessary to make the application complete.” DCD never performed this determination with respect to the Club’s SDAP-Grading 2 application. CP

at 467–70. The County “canceled” the application because it was not the “correct permit type” and said nothing about whether it was a complete or incomplete SDAP-Grading 2 application. *Id.*; *see also* CP at 442. The County’s own actions refute its argument that the type of SDAP application required by the purge condition is irrelevant so long as the Club submits a complete application.

The County’s argument that the type of application submitted by the Club is irrelevant to the Club’s performance of the purge condition also contradicts numerous statements by the County in this appeal and before the trial court. For instance, in the County’s declarations of Shawn Alire and Jeff Rimack, DCD staff testified the Club’s SDAP-Grading 2 application was “the inappropriate permit.” Resp. at 22; CP at 437–38, 441–42. The County argues the Club’s evidence is insufficient to prove “an SDAP [Grading] 2 is the proper permit type.” Resp. at 23. The County contends it received information from the Club’s consultants that “suggested that the Club would need a commercial SDAP.” Resp. at 11. The County also argues it obtained information during pre-trial discovery that leads it to believe “at least 5,000 cubic yards of earth has [sic] been moved.” Resp. at 23. The County admits there was a “change from DCD regarding a[n] SDAP 3 to an SDAP Commercial.” Resp. at 23.

The County's words and actions show the type of SDAP application required to cure the violations found in the original Judgment is critical to the purge condition and the Club's ability to perform the condition. The County cannot diminish the significance of this appeal by arguing the type of application submitted by the Club is "irrelevant."

**D. The Trial Court Erred by Fashioning a Purge Condition That Is Not Reasonably Related to the Cause or Nature of the Contempt.**

The Unpublished Opinion held that "if the purge condition involves something other than complying with the original order that the contemnor violated, the condition must be 'reasonably related to the cause or nature' of the contempt." Unpublished Op. at 20 (citing *In re Rapid Settlements*, 189 Wash. App. 584, 614, 359 P.3d 823 (2015); *M.B.*, 101 Wash. App. at 450). The Club's Opening Brief argued the trial court erred by fashioning a purge condition that is not reasonably related to the cause or nature of the contempt. Opening Br. at 22–25.

The purge condition complies with this legal standard insofar as it requires the Club to apply for permitting "to cure violations of KCC Titles 12 and 19 found to exist on the Property in the original Judgment[.]" CP at 454. That is the language used in the Permitting Order itself. CP at 45. The purge condition does not comply with this standard, however, insofar as it allows the County to require the Club to submit an SDAP-

Commercial application, which is more costly and onerous than the SDAP-Grading 2 application needed to cure the violations found in the original Judgment.

The County responds that the purge condition “does not require anything additional or different than [the Permitting Order in] the Supplemental Judgment.” Resp. at 21. Yet the County interpreted the purge condition to do just that when it required the Club to submit an SDAP-Commercial application. If the non-specificity of the purge condition means the County can require the Club to submit a complete SDAP-Commercial application (and cancel any other application type), then the purge condition is not reasonably related to the cause or nature of the contempt and must be vacated.

The Club’s Opening Brief discussed the instructive case of *Matter of Marriage of Galando* (“*Galando*”), 200 Wash. App. 1031, 2017 WL 3701696 (Aug. 28, 2017) (unpublished decision). There, an ex-wife held her husband in contempt of a parenting plan and obtained a purge condition that required her ex-husband to telephone their children when they were not residing with him. *Id.* at \*1, 6–7. The parenting plan, however, did not *require* such telephone calls, but only *permitted* them. *Id.* at \*7. Because the purge condition required more than the underlying order itself, the Court of Appeals reversed the purge condition. *Id.*

The County is like the ex-wife in *Galando* because it construes the purge condition to require the Club to submit a complete SDAP-Commercial application, which is more than what is required by the underlying Permitting Order. If the non-specific purge condition allows the County to require the Club to submit an SDAP-Commercial application, then the purge condition is not reasonably related to the cause of the Club's contempt and must be reversed.

**E. This Appeal Is the Only Way the Club Can Obtain Independent Review of the County's Impermissibly Discretionary Purge Condition and Whether It Requires an SDAP-Commercial Application.**

According to the County, if the County denies an SDAP application because "the County disagrees that it is the correct type of permit and denies the permit based on the information provided by the Club in the application," then the Club can appeal that decision to the Kitsap County Hearing Examiner pursuant to KCC § 21.04.290. Resp. at 26. The County's implication is that this Court need not decide "the specific type of permit" required by the Contempt Order (Resp. at 27) because the Club can appeal that issue to the Hearing Examiner.

Setting aside the fact that a Hearing Examiner cannot decide whether a purge condition is lawful, the County's argument is unavailing because its cancellation of the Club's SDAP-Grading 2 application was

not a final, appealable decision. The County's supposition that the Club could have appealed the cancellation to a Hearing Examiner is plainly contradicted by the County's own code.

KCC § 21.04.290 provides for a Hearings Examiner to hear local appeals of "final decisions" regarding project permit applications. KCC § 21.04.110 shows the procedures for getting to a final decision regarding various types of administrative permit processes. KCC § 21.04.100 applies Type II procedures to an SDAP application unless it is exempt from SEPA. Neither party has advocated for a SEPA exemption to apply here, so Type II procedures apply. They require a number of formal steps to get to a "Final Decision" of the Director of DCD. KCC § 21.04.110. These steps include a letter of completeness, a notice of application, a notice of decision. *Id.*

There is no way to construe the County's abrupt and immediate cancellation of the Club's SDAP-Grading 2 application as a final decision appealable to a Hearings Examiner pursuant to Kitsap County Code. The cancellation prevented the Club from ever obtaining that type of appealable decision regarding its application. The present appeal before this Court is the only way the Club can get independent review of the County's impermissibly discretionary purge condition and whether it requires an SDAP-Commercial application.

**F. The Club Has Ample Incentive to Comply with the Permitting Order Even in the Absence of the Contempt Sanction, Whose Non-Specific Purge Condition Promotes Punishment, Not Remediation.**

The County's Response falsely argues that if "the Club were allowed to continue to operate as if it were not in contempt" there "would be no incentive for the Club to comply." Resp. at 2. This argument might support the imposition of a *lawful* purge condition, not the unlawfully discretionary purge condition at issue here. Moreover, the argument is fundamentally wrong. As noted in the Club's Opening Brief, the County has a warrant of abatement under which it can abate the Club's site development violations and hold the Club liable for the cost. Opening Br. at 20–21; CP at 34, 45. This gives the Club ample incentive to comply with the Permitting Order.

Rather than proceeding with its warrant of abatement to remediate the violations, the County has been working to keep the Club shut down unless it complies with the County's erroneous and changing interpretation of a non-specific purge condition. This is evidence that the County cares more about punishing the Club than abating the violations. If the Club does not agree with the County's latest, discretionary determination of what is the "correct permit type," which no court has

ever affirmed, then the County cancels the Club's application and its punishment continues.

The non-specific purge condition allows the County to exercise its discretion in unpredictable ways to keep the Club off balance and unable to purge the contempt sanction. The non-specific purge condition promotes punishment, not remediation, and therefore must be reversed.

**G. If the Purge Condition Should Have Required the Club to Submit an SDAP-Grading 2 Application, Then the Club's "Inability Appeal" in Case Number 53878-4-II Will Be Moot; Otherwise, the Inability Appeal Will Need to Be Decided.**

The Court may have questions about whether a decision in this appeal could moot or otherwise affect the Club's related appeal before this Court in Case Number 53878-4-II, which pertains to the Club's inability to perform the Purge Condition ("Inability Appeal"). "A case is moot, and should be dismissed, when it involves only abstract propositions or questions, the substantial questions in the trial court no longer exist, or a court can no longer provide effective relief." *Eyman v. Ferguson*, 7 Wash. App. 2d 312, 320, 433 P.3d 863 (2019). If the Court decides the purge condition should have required the Club to submit an SDAP-Grading 2 application, then the Club's Inability Appeal will be moot because that appeal relates to whether the Club had the ability to submit a complete

SDAP-Commercial application. Otherwise, the Inability Appeal will need to be decided.

This shows one of the prejudicial effects of the non-specific purge condition. The Amended Contempt Order says the Club can terminate the contempt sanction if it proves it “does not have the ability to perform the Purge Condition” or that it “lacks the ability to cure violations of KCC Titles 12 and 19 found to exist on the Property in the original Judgment.” CP at 454. Because the County cancelled the Club’s SDAP-Grading 2 application without reviewing it for completeness, the record is unclear as to whether the Club has the ability to submit a complete SDAP-Grading 2 application to purge the contempt. But if the County’s requirement of an SDAP-Commercial application was erroneous, then the Club’s showing of inability to submit that type of application is moot.

If the Court decides in this appeal that the purge condition should have required the Club to submit a complete SDAP-Grading 2 application, then the Inability Appeal will be moot because it will address the Club’s inability to perform a purge condition that is no longer in effect. In the resulting remand, the Club will have the opportunity to purge the contempt by either completing its submission of an SDAP-Grading 2 application to the County or by proving it is unable to perform even that less burdensome purge condition. If, however, the Court affirms the existing,

non-specific purge condition, then it will have deferred to the County's position that an SDAP-Commercial application is required; the Inability Appeal will not be moot; and it will need to be decided.

### III. CONCLUSION

For the foregoing reasons, the Amended Contempt Order, or at least the portion of it that states the Purge Condition, should be reversed or vacated and remanded for entry of a purge condition consistent with the legal standards discussed above. The Court should also instruct the trial court to refashion the Purge Condition to require the Club to submit no more than a complete SDAP-Grading 2 application.

DATED: March 20, 2020

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*(pro hac vice)*

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## DECLARATION OF SERVICE

I, Ethan Jones declare, under penalty of perjury under the laws of the State of Washington, that I am a resident of the State of Oregon, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

On March 20, 2020, I caused to be served a copy of the within REPLY OF APPELLANT via e-mail to the following:

Laura F. Zippel  
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614 Division St., MS-35A  
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DATED: March 20, 2020

CHENOWETH LAW GROUP, PC

/s/ Ethan Jones  
Ethan Jones, Paralegal  
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**CHENOWETH LAW GROUP, PC**

**March 20, 2020 - 4:21 PM**

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**Appellate Court Case Title:** Kitsap County, Respondent v. Kitsap Rifle and Revolver Club, Appellant  
**Superior Court Case Number:** 10-2-12913-3

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